to each question as asked in and of itself as to the statement.

The Court: You mean as it is read?

Mr. Fennelly: Yes, your Honor.

The Court: Very well.

Mr. Fennelly: A further objection to the admission of the statement, that there has been no proof offered of the necessity of a net worth statement, as they haven't shown that the books were not kept during the years 1946 through 1949 from which income tax liability could be determined.

The Court: Objection is overruled, and the statement as amended is received.

(Government's Exhibit 23 for identification received in evidence as amended.)

The Court: Now, ladies and gentlemen, ordinarily (71) I suppose it would be read to you at this time, but we will take it on tomorrow.

We will adjourn now until 10.30 tomorrow morning. In the meantime, remember the instructions that I have given you: Don't talk about the case among yourselves, and certainly not with anybody else, keep your minds open until all the evidence is in and the case is submitted to you under the instructions of the Court, if we arrive at that point in the trial. 10.30 tomorrow morning.

(Adjourned to April 7, 1954, at 10.30 a.m.)

James A. Ronayne—for Government—Direct

(72) New York, April 7, 1954;
10.30 o'clock a.m.

Trial resumed.

JAMES A. RONAYNE resumed.

The Clerk: If there are any witnesses in the room, except the special agents for the Government, they will please retire to the witness room.

Mr. Fennelly: Excuse me. Your Honor, I had understood that the special agents, except those who were to testify as to accounting matters, were not to be in the room either.

The Court: Yes, that is true.

Mr. Fennelly: Are there any special agents in the room?

Mr. MacMahon: There are two.

The Court: No, only the agents—I think the clerk was referring to the two agents who were here yesterday and who are sitting at the table of the Government.

If there are any other Government agents in the room who are to be witnesses they will please retire (73) to the witness-room.

Mr. MacMahon: Would your Honor also make that applicable to any witnesses for the defense?

The Court: Oh, yes, that applies to all witnesses, yes.

Mr. Fennelly: Except Mr. Sweeney, who is sitting here, too.

The Court: I take it—

Mr. Fennelly: He is an accountant.

The Court: —he is working with you on the case. You may call him for accounting testimony.

Mr. Fennelly: I may.

The Court: Very well.

Mr. MacMahon: Now, may I proceed, your Honor?

The Court: Yes.

Mr. MacMahon: Your Honor, at this time I wish to substitute a blocked-out photostat for Government's Exhibit 23 in evidence.

Mr. Fennelly: Of course, I don't have to renew my objection, your Honor, but instead of objecting to each question as read I think I should make one single objection.

The Court: You have objected to the admission of the whole exhibit as it now stands after the consent of the Government to strike out certain things that (74) were made yesterday in conference. As it stands now, you object to it, even with all that blocking out?

Mr. Fennelly: Yes.

The Court: I should think that ought to protect you.

Mr. MacMahon: May I read Government's Exhibit 23 to the jury?

The Court: Yes, you may.

(Mr. MacMahon reads to the jury from Government's Exhibit 23.)

(75) Mr. MacMahon: Your witness, Mr. Fennelly.

Cross Examination by Mr. Fennelly:

Q. Mr. Ronayne, how long were you in the Bureau of Internal Revenue? A. From June 1935 to June 1945.

Q. That is, ten years? A. Ten years.

Q. You are an accountant, are you not? A. Yes, sir, I am.

Q. You are also a member of the Bar of the State of New York? A. I am.

Q. How long have you been practicing law? A. Since June 1945?

Q. In 1937 you were attached to the Intelligence Unit, was it, of the Internal Revenue Bureau? A. Yes, sir.

Q. At the time you took this statement from Mr. Costello he had no warning or preparation to be examined as to any net worth, did he?

Mr. MacMahon: I object to the form of that question.

The Court: I will allow it.

The Witness: Do you want to read the question again?

(Question read.)

A. No, sir.

(76) Q. What was the answer? A. No, sir, he did not.

The Court: You mean as far as you were concerned, you gave him no notice?

The Witness: I gave him no warning. I am sorry.

Q. As a matter of fact, you told him at the outset that this was an examination to determine tax liability for past years, didn't you? A. Yes, at the opening of the statement I made some opening remark, it was in connection with his income tax liability. That would necessarily indicate a prior year.

Mr. Fennelly: May I have the original statement?

Mr. MacMahon: At this time I object to any-

thing which was struck out of this statement at Mr. Fennelly's express request.

The Court: I don't know what he is going to do.

Do you intend to ask him about any of those matters?

Mr. Fennelly: I am going to ask him if he did not tell the witness he was inquiring about past years and not about 1937.

(77) The Court: Just said he did.

Mr. Fennelly: I am sorry. I didn't hear the answer. May I have the answer read? I am sorry; I didn't hear the answer.

(Record read.)

Q. Now, the stenographer, Miss Thelma Murray, by whom was she employed? A. She was employed by the Bureau of Internal Revenue in the Intelligence Unit as a stenographer.

Q. Do you know whether she is still employed there? A. I believe not. I believe she is employed in some Government agency today, but I recall she left the Intelligence Unit quite a few years ago.

Q. Do you know whether the statement, Exhibit 23, contained all that was said at that hearing? A. Well, it didn't—

Mr. MacMahon: I object to that as immaterial. This is the statement which Mr. Costello signed on each and every page, and if there was anything omitted, he had his opportunity to put it in. He didn't do so. There were some insertions made in the statement, as your Honor knows.

The Court: Yes. Well, that is argument. I will allow it.

Mr. Fennelly: He might not even have known it (78) was omitted.

The Court: I didn't hear that, but let us get ahead with the question. I have allowed the question.

(Question read.)

A. I couldn't definitely state that that was everything said at that time. I would say, for the most part, it contains anything pertinent and material. There was some discussion off the record, not too long, as I recall, but just what they were, I couldn't state at this time.

Q. Could you tell us now, after 17 years, that this statement contained everything that was said at that hearing? I mean, even apart from the purposely off the record— A. No, I wouldn't state—

Q. —statements? A. —it contained everything that was said.

Mr. Fennelly: Would the Government please produce the stenographic notebooks of Miss Thelma Murray?

The Court: Do you have them?

Mr. MacMahon: Your Honor, I suggest it would be cumulative. If Mr. Fennelly would like to call—

The Court: Just a minute. I have asked you a question.

Mr. MacMahon: Yes, sir.

(79) The Court: Do you have them?

Mr. MacMahon: Yes, sir.

The Court: Very well.

Mr. Fennelly: Now, may I have them?

The Court: You go on with the questioning. I will think about it. You can't have them now, if that is what you mean. I don't know whether you are entitled to them at all or not. You may be. But

I will think about it. You can go on and I will reserve decision on your request.

Q. Do you know where Thelma Murray is? A. No, sir, I do not.

Q. Did you appear before the grand jury that returned this indictment?

Mr. MacMahon: I object to the question, your Honor, on the ground that it is irrelevant.

The Court: Sustained.

Mr. Fennelly: If your Honor please, I certainly have a right to interrogate this witness as to whether or not he appeared before a grand jury, on cross examination.

The Court: That is exactly what I have said you have not the right to do. You and I disagree on that. But you have a ruling and you may use it wherever you think it appropriate.

(80) Mr. Fennelly: May I ask him the question in the form of whether or not he testified there?

The Court: You may ask it.

Q. Did you testify before the—

The Court: Don't answer that until I find out whether there is objection to it.

Q. —before the grand jury that returned this indictment?

Mr. MacMahon: I object on the same ground, your Honor.

The Court: Sustained.

Mr. Fennelly: If your Honor please, for the purpose of the record I submit that I have a right to—

The Court: Now, Mr. Fennelly, if you are going to press this you will do it at another time.

Mr. Fennelly: May I—

The Court: I ruled on this yesterday; I have ruled on it twice this morning. I prefer not to have argument on it now.

Mr. Fennelly: Well, I would like to have it appear in the record then that I make a demand for the grand jury minutes as to this witness, if he testified—

The Court: Your demand is noted.

Mr. Fennelly: —for the purpose of cross examining him.

(81) The Court: Your demand is noted.

Mr. Fennelly: And am I denied the grand jury minutes for the purpose of cross examining this witness?

The Court: Yes, you are.

Mr. MacMahon: Your Honor, we would be happy to make them available to your Honor to read them for any inconsistencies.

The Court: I have not asked for them.

Mr. Fennelly: Well, I would ask your Honor to read them so that I might cross examine this witness, not only for you to read them but I might have them to cross examine the witness.

Mr. MacMahon: Your Honor, I just want to state the Government's position there. We would make them available to your Honor, and if there are any —if your Honor finds any inconsistencies, then to that extent that they be given to Mr. Fennelly.

The Court: Very well, you may make them available.

Q. Now, Mr. Costello told you, did he not, that in the year 1936 he had received from the Phil Kastel partner-

ship some 78 thousand odd dollars, is that right? A. Yes, sir.

Q. And that he had received that money in cash? A. Yes, sir.

(82)Q. And that money was all reported in Mr. Costello's 1936—

Mr. MacMahon: Your Honor—

Q. —income tax, was it not?

Mr. MacMahon: —if the witness knows.

The Court: Oh, just a minute, please, I can't—

Q. As a matter of fact, you just read—

The Court: Pardon me. Do you mind if I tell you what my difficulty is? Maybe it will help you to help me.

When somebody is interrupted while he is stating a question, whether it is for the purpose of objecting or not, we might just as well stop the proceedings there because I can't rule on a question which I haven't heard.

Mr. MacMahon: I am sorry, your Honor. I thought the question was finished.

The Court: Everybody has been doing it. Just let's see if we can't slow it up a little bit.

What is the question that I am asked to rule on, or is the objection withdrawn?

Mr. Fennelly: Will you read the question?

(Question read.)

The Court: Now, do you object to that question, Mr. MacMahon?

(83) Mr. MacMahon: I just say, if the witness knows, your Honor.

The Court: Now, are you able to answer that question?

The Witness: I don't know just what the question is now, Judge.

The Court: All right, we will have it re-read.

Mr. MacMahon: I concede that it was and at this time offer the Exhibit 15 for identification which was taken yesterday subject to connection. Where is it? There it is.

Mr. Fennelly: All I wanted—I have the concession of the Government that it was included in Mr. Costello's 1936 income tax return.

The Court: Very well. You also have the Government's offer of the income tax return which shows its report and payment.

Mr. MacMahon: It is in evidence, your Honor, subject to connection.

The Court: Very well.

Mr. MacMahon: This is the connection.

Q. Now, wasn't it a practice of your Bureau at that time to take net worth statements when you took them as of a year end? A. I would say the usual practice is to take them at the beginning or the end (84) of a year.

Q. And that was not done in this case, was it? A. No, sir.

Q. And you never examined Mrs. Costello as to her assets or net worth, did you? A. No, sir.

Q. Now, if Mr. Costello had lost $95,000 on a bet a month before you took this statement, he wouldn't have that as an asset, would he?

Mr. MacMahon: Your Honor, I object to the question; it is assuming facts not in evidence.

The Court: Overruled.

Q. In other words, if he paid it— A. If he had paid it out he wouldn't have the money.

Q. If he had a loss of 95,000, say, a month before you took the statement he wouldn't have that as an asset at the time you took the statement, is that right? A. That is correct.

Q. Now, suppose that Mr. Costello won after you took the statement and before the year end of 1937 $95,000, that would offset his loss, would it not, and he would then have an asset of $95,000 after the taking of his statement, is that right?

Mr. MacMahon: Your Honor, the same objection.
The Court: Overruled.

A. Yes, assuming that he collected the winning of (85) $95,000, yes, sir.

Q. That is right. And that would be so up until the end of the year 1937, he could offset any losses in that year, gambling losses, for instance, on horses against his wins for that year? A. Yes, sir.

Q. And to the extent of the losses that he had prior to your taking the statement and the gains that he made afterward, he would recoup that much in net assets; right? A. Yes, sir.

Q. And if there had been a loss of $95,000, say, a month before, betting on a horse, your taking this statement, and he had won and was paid—

The Court: You say "taking this statement." What statement?
Mr. Fennelly: Exhibit—
The Court: Oh, you mean that question and answer statement.
Mr. Fennelly: Exhibit 23.

The Court: I thought you meant—it was confusing because you had been talking about a net worth statement.

Mr. Fennelly: I am sorry, your Honor, but I have not been explicit.

Q. And if he had won immediately thereafter and was (86) paid the very next day for the same amount of $95,000 he would have that as an asset? A. Yes, sir.

Q. And under the circumstances that I have outlined to you, I am assuming a loss of $95,000 prior to the taking of the statement and a win of a similar amount thereafter, that win would not be taxable as income because it would be an offset against the loss, is that right? A. Yes, gambling losses may be used to offset gambling gains, and on your statement of fact one would offset the other. There would be no net income derived from such a transaction.

Q. And without that information as to the losses before and the gains thereafter in the year 1937, you could not tell what a man's net worth was?

Mr. MacMahon: Your Honor, I object to that. This witness has not been qualified as an expert.

The Court: Let me hear the question.

(Question read.)

The Court: For what year?

Mr. Fennelly: 1937.

The Court: I will allow it.

A. Well, as I testified previously, net worth is generally taken at the beginning or the end of the year. If your question is, could I tell what his net worth was at the end of the year, no. At that date I took the (86-A) statement his net worth was a certain amount that he told me it was. But

that is subject to this contention you raised on the gambling transactions.

(87) The Court: In other words, what you are saying is that a man's net worth on a given day could be X dollars?

The Witness: Yes.

The Court: And thirty days from there it might be X minus or it might be X plus?

The Witness: Yes.

The Court: Depending on whether he had acquired assets or lost something.

The Witness: This is—

The Court: Or whether one offset the other.

The Witness: Or whether one offset the other, yes, sir.

Q. If he had had a loss of $95,000 a month before you took the statement and he had made a bet and won and not been paid as of the time he gave the statement, he would have a receivable in that amount, wouldn't he? A. Yes, sir.

Q. I notice that this statement was taken on October 18, 1937, and sworn to on the 19th. Was it the custom to have statements prepared and sworn to in that close proximity of time? A. No. Generally it took a little longer. Generally took a little longer.

Q. How long was the normal time? (88) A. Three or four days. A week.

Q. Do you recall whether or not there was any circumstance that brought about this having it signed the next day? A. Yes, I can recall that the defendant in this case wanted to sign it the very day it was taken, he wanted to go away, but the stenographer couldn't transcribe it in time. So he came around the next morning.

Q. Do you recall now whether there were any off-the-record statements by Mr. Costello, that he told you that

in the year 1937, prior to your taking the statement, that he had lost money on betting? A. Did you say prior to the statement?

The Court: Did he tell you—

Q. That he—

The Court: —off the record, at the time the statement was being taken, that sometime prior to the taking of the statement he had lost money on betting?

The Witness: Yes. Even in the statement he told me he had lost money on betting.

Q. Let me see if I can refresh your recollection. In the statement he told you that he had lost money in betting in 1936, is that not right? A. I think I can possibly point out something there where I believe he said he owed six or seven thousand (89) dollars in gambling debts towards the latter part of that statement, as I heard it read this morning.

Q. Referring you first to the bottom of page 7 of your statement where you were asked—where you asked the question, "Were you still engaged in gambling in the year 1936? A. Yes," and on the top of page 8 "You had no income from gambling? A. No, I lost money," you were referring to the year 1936, is that right? A. In that spot?

Q. Yes. A. Yes, sir.

Q. And the other places you referred to, on page— the last page? A. Well, I asked him a question, "Any other liabilities? A. Probably six or seven thousand at the race track at the present moment because these things are taken up from day—"from one day to another."

Q. Yes. And I am not talking about current liability. I am talking about losses that he had had during the year

1937 and that he had paid prior to your taking the statement.

What I want to know is, did he tell you anything about those off the record at that hearing? A. Well, he did say that he was anxious to get this signed and get away. He wanted to go to Hot Springs. He wanted to get a change of luck. He was running badly. (90) That's all. There were no figures or anything of that nature. Things were running bad in gambling; he wanted to change his luck. He wanted to go to Hot Springs.

Q. Didn't he indicate to you in words or in substance that in 1937, before you took the statement, that he had lost money on the rack track and paid it? A. I just told you what he said, that things were going badly with him. He wanted a change of luck. He wanted to go away, get down to Hot Springs to get a change of luck.

Q. And no amount was mentioned? A. No, sir.

Mr. Fennelly: That is all.

The Court: Very well. Will you make—we will take our recess—will you make available to me, Mr. MacMahon, the Grand Jury minutes here?

Mr. Witness—Do you have them here in the court room with you?

Mr. MacMahon: We will obtain them during the recess.

The Court: You will get them for me and I will look at them, Mr. Fennelly, and give you a ruling whether I find any inconsistency in the statement, and I will hold the witness here, so, if you desire to go further with him, you may.

Is that agreeable to you?

(91) Mr. Fennelly: Yes, your Honor. I would like the witness to stay here.

The Court: Oh, yes, I have ordered him to stay, but

I will look at the minutes now, and if I find any discrepancy, I shall make them available to you, at least that part where the discrepancy, if any, appears.

We will take our recess now.

(Jury retires.)

(Recess.)

The Court: Now, Mr. Fennelly, I advise you that I have read the Grand Jury minutes and I state to you that I find no contradiction in the Grand Jury minutes with anything that this witness has said.

Mr. Fennelly: I offer to prove, your Honor, that this witness was not before the Grand Jury.

The Court: I decline to accept the offer because I think it is immaterial.

Mr. Fennelly: I have made a motion, if I may explain to your Honor, in this case for an inspection of the Grand Jury minutes on the ground that there was no competent evidence before this Grand Jury.

The Court: Was that motion decided?

Mr. Fennelly: Yes; I was refused an inspection of the Grand Jury minutes.

The Court: Then your record is protected.

(92) Mr. Fennelly: I expect to show during the course of this trial that there—

The Court: I don't hear you.

Mr. Fennelly: I expect to show during the course during the course of this trial that there was no competent evidence before the Grand Jury upon which this indictment was based.

The Court: You have offered to do that, but I shall decline to accept the offer of proof because it is not an issue before this jury whether or not the

indictment was based on competent testimony before the Grand Jury.

Your motion, which was denied, settles the law on that as far as I am concerned, and your record is protected.

Mr. Fennelly: May I refer your Honor to United States v. Krulewich in this Circuit, 154 Fed. 2d.

The Court: For what point?

Mr. Fennelly: That it is not sufficient that the Court inspect the Grand Jury minutes; that counsel must inspect them.

The Court: (To Court Crier) Would you go up and get me this citation?

(Court Crier left the room.)

(A pause.)

(Court Crier returned to the court room.)

(93) The Court: Why, of course, that is Hornbook Law. I told you that I find no contradictory statement by this witness, but you cite the Krulewich case for the proposition that you have a right to examine the minutes to ascertain whether it contradicts. I have ruled. And now if you have no further questions of this witness, we will dispense with him.

Mr. Fennelly: Solely my question as to what your Honor—

The Court: What?

Mr. Fennelly: Solely my question which your Honor has overruled.

The Court: I didn't get the first part of it.

Mr. Fennelly: I say, solely my question, which your Honor I understand has ruled on.

The Court: Which question?

Mr. Fennelly: To the witness, as to whether or not he has testified.

The Court: I have overruled it.

Mr. Fennelly: Pardon?

The Court: I say I have overruled it.

Mr. Fennelly: Yes.

The Court: (To the witness) You may withdraw.

The Witness: Thank you.

(Witness excused.)

(94) The Court: Call your next witness.

Mr. MacMahon: Recall William N. Murphey.

WILLIAM N. MURPHEY, resumed.

Direct Examination by Mr. MacMahon (Continued):

Q. Mr. Murphey, are books and records maintained in the office of the Upper Manhattan District showing payments made for the accounts of Frank Costello, Loretta B. Costello and their joint accounts on Federal income tax returns? A. Yes, they are.

Q. I show you Government's Exhibit 20 for identification and I ask you if those are such records. A. Yes, sir. These are copies of the assessment lists.

Q. Now, have you prepared a schedule based on Government's Exhibit 20 for identification? A. Yes, sir, I have.

Q. And on income tax returns of Frank Costello, Loretta Costello and their joint income tax returns now in evidence showing the dates and the amounts of the tax payments for the accounts of Frank Costello, Loretta B.

Costello and their joint accounts during the period October 18, 1937, through December 31, 1949? A. Yes, sir, I have prapared such a schedule.

(Marked Government's Exhibit 24 for identification.)

Q. I show you Government's Exhibit 24 for identification (95) and ask you if that is the schedule which you have prepared? A. Yes, sir, this is the schedule I prepared.

The Court: May I see it, please?

Mr. MacMahon: Yes, your Honor (handing to Court).

I offer it at this time.

The Court: Thank you (returning exhibit).

(Mr. MacMahon hands Exhibit 24 for identification to Mr. Fennelly.)

(A pause.)

Mr. MacMahon: Your Honor, I also offer Exhibit 20, on which the schedule is based.

(A pause.)

Mr. Fennelly: Your Honor, I object to this schedule, Exhibit 24 for identification, on several grounds: One, as to Loretta Costello, it is immaterial and irrelevant in the trial of this case; and also that it includes the taxable year for which payment is made where the sole issue was whether or not—how much was paid for the purpose of showing an expenditure; and it also does not break down the items of interest which appear on the basic record, which would be a taxable deduction.

The Court: What do you say to that?

Mr. MacMahon: Your Honor, as to the first one, (96) materiality of it—

The Court: You needn't stress that.

Mr. MacMahon: As to the second one, as to the years, I submit that at this time that any delinquency in payments of taxes for prior tax years is corroborative, your Honor, of the defendant's net worth as of 1937. As to the third point, it doesn't break down the interest payments, but whatever deductions for interest the defendant has are shown on his income tax return, and the Government doesn't question that.

Mr. Fennelly: I am afraid that is not so. As a matter of fact, in the bill of particulars the Government itself is allowing as a deduction interest which the defendant did not claim.

The Court: You are not going to protest that?

Mr. Fennelly: Not at all, but if they are going back to 1937, I think I will find prior interest—I don't know—I haven't examined these tax returns before, going back that far, but I certainly want from the Government records the amounts that they say were paid to the Government as interest.

The Court: I think, if that is in your records, that it ought to show, but I see no reason why that cannot be added to the exhibit.

Mr. MacMahon: Yes, your Honor. We will be happy (97) to do so.

The Court: And the other grounds, which I take it are your main grounds of objection, the objection is overruled and the Government stipulates now that it will offer an additional schedule or amend that so as to show the breakdown with respect to interest.

Mr. Fennelly: I understood the Government had

also offered Exhibit 20 for identification in evidence.

The Court: Yes.

Mr. Fennelly: I object to it on the same grounds that I did yesterday that—

The Court: I wonder if you really need that in, now that this schedule is in?

Mr. MacMahon: I withdraw my offer.

The Court: You marked that for identification and it is available as a document basic to the exhibit which is now going in.

Mr. MacMahon: Yes, your Honor.

The Court: You withdraw the offer—

Mr. MacMahon: Yes, your Honor.

The Court: —of 20, and that remains marked for identification; and Exhibit 24, as offered and as it will be amended pursuant to the Government's stipulation, will be received.

(Marked Government's Exhibit 24 in evidence.)

(98) Mr. Fennelly: I wonder if the Government would let me have a copy of one of these so I may work from it?

The Court: Copy of 24? Yes.

Mr. MacMahon: May the record indicate that the Government has supplied Mr. Fennelly with the copy at this time?

The Court: Hereafter, if it is convenient, where you have any tabulations like that, which witnesses have made from basic records, if it is possible I think it would be helpful and shorten the trial, certainly, if you could have a copy made available for Mr. Fennelly.

Mr. MacMahon: Yes, your Honor.

(Marked Government's Exhibit 25 for identification.)

(Marked Government's Exhibit 26 for identification.)

Mr. MacMahon: Your Honor, at this time I offer a certified copy of a tax refund check drawn by the Treasury of the United States for a tax refund for the year 1948 payable to the order of Frank and Loretta B. Costello in the amount of $6,124.52.

The Court: What's that?

Mr. MacMahon: $6,124.52. Dated April 12, 1949, and endorsed by Frank—

(99) Mr. Fennelly: Just a minute. Is that in evidence?

The Court: No, it is not.

You are offering it; why don't you let Mr. Fennelly see it?

Mr. Fennelly: Description of them—I object to any—doing something I thought was—

The Court: Yes, I think that is right.

(A pause.)

The Court: Have you this 26 for identification?

The Clerk: Yes, I marked it for identification but I don't have the description of it.

The Court: Are you showing Exhibit 26? Have you shown Exhibit 26 to Mr. Fennelly also?

Mr. MacMahon: Yes, your Honor.

The Court: That is all right. I thought we would save a little time if he looked at both of them.

Will you tell me what that is for my notes? Is that a certified copy of some document?

(100) Mr. MacMahon: A refund check, your Honor.

The Court: Very well.

The Clerk: 26 for identification?

Mr. MacMahon: Yes.

Mr. Fennelly: No objection.

The Court: What is the date of it and the amount and by whom payable?

Mr. MacMahon: Exhibit 26, your Honor, the amount on Exhibit 26 is $11,741, to the order of Frank and Loretta B. Costello.

The Court: What is the date of it?

Mr. MacMahon: The date of it is May 14, 1948.

The Court: A refund on taxes for what year?

Mr. MacMahon: 1947, your Honor.

The Court: All right.

Mr. MacMahon: The endorsement on the back of Exhibit 26 for identification, your Honor, is Frank and Loretta B. Costello.

The Court: Well, you have—it has not been admitted, and—

Mr. MacMahon: He had no objection.

The Court: You have no objection?

Mr. Fennelly: I have no objection, your Honor.

The Court: Very well. All right, it is admitted.

(101) Mr. MacMahon: May I read the endorsement, your Honor?

The Court: You may.

Mr. MacMahon: Frank and Loretta B. Costello, Frank Costello.

May I read the endorsement on the back of Exhibit 25 in evidence: Frank and Loretta B. Costello for deposit Frank Costello.

The Clerk: Exhibit 26 for identification received in evidence.

25, no objection?

Mr. MacMahon: No objection.

The Clerk: It is also a refund check, isn't it?

Mr. MacMahon: Yes.

(Government's exhibit 25 for identification received in evidence.)

Mr. MacMahon: Your Witness, Mr. Fennelly.

Cross Examination by Mr. Fennelly:

Q. Mr. Murphey, did you appear before the grand jury that returned the indictment in this case? A. No, sir.

Q. Did you testify before it? A. No, sir, I did not.

Q. Now, how long have you been with what is now known as the—Director's office I guess, is it? (102) A. Yes, sir.

Q. Of the uptown, do they call it? A. Upper Manhattan District.

Q. Upper Manhattan District, which used to be the Third, is that right? A. That is right, sir.

Q. How long have you been there, sir? A. A little over seven years.

Q. That would bring you to, say, what? Nineteen forty— A. '47 I entered service.

Q. '47. So that you were not there at the time Exhibit 20 for identification was made between 1937, and what year was it you said, sir? A. '47, sir. February '47 I went into the service.

Q. You were not there for those ten years, were you? A. No, sir.

Mr. MacMahon: Your Honor, I object to the question as immaterial.

The Court: It has been answered. And it is pretty obvious, anyhow, that if he started in '47 that he wasn't there in 1937. All right.

William N. Murphey—for Government—Cross

Q. Did I understand you to say yesterday that the Government had destroyed the income tax returns prior to the year 1941? A. That is right, sir.

Q. And did they destroy all records pertaining to income tax returns such as agents' reports at that time, too? (103) A. I believe the mimeograph covered—gave permission to also destroy certain reports, sir. Now, I am not sure how far they went with that.

The Court: The question you were asked was, as far as you know did they destroy the reports? I take it your answer is you don't know whether they did or not.

The Witness: I don't know.

The Court: Very well.

Q. But they were authorized to, is that right? A. I don't know, sir. I know they were authorized to destroy the returns.

Q. Yes. But do you know whether or not they were authorized to destroy other records, such as the agents' reports? A. I do not, sir.

Q. Now, you testified yesterday that there was some record in your office from which you could tell whether or not an income tax had been returned prior to 1941? A. Yes, sir.

Q. Where you did not have the copy. Now, what record was it that you referred to? A. We have index files, sir. It contains the name and address and the account assigned to every return filed in our district. They are on microfilm now.

Q. Are they on microfilm back through 1937? (104) A. Yes, sir.

Q. And does each account have a number? A. Yes, sir.

Q. And what was the number of the account of Frank Costello? A. I would have to look at my index, sir. I couldn't carry it in my head. There is a different number for every year, Mr. Fennelly.

Q. A different number for every year? A. That is right, and a different number for every deficiency.

Q. And there would be a different number for Mrs. Costello? A. That is right, for every year.

Q. Now, when a check is received in payment of income tax in your office in the regular course of doing the work of your office, what is the first entry that is made on any record of your department as to that check? A. Well, first, the first thing to do is to identify the check with the proper account. Usually the taxpayer send in a letter or a bill with the check. And we look for that particular account number, deposit the check, make up our journals and our vouchers and post to that account.

Q. And what is the first entry of posting that you do? That is what I am trying to find out. A. You mean when the original return comes in or (105) the check, sir?

Q. The check. A. Well, the original account is all set up, unless the check accompanies the return—

Q. What I am trying to find out is, that your Bureau receives a check from a taxpayer— A. Yes, sir.

Q. Would you tell me what the first entry is by anyone in your department on any bookkeeping record with relation to that check? A. We prepare a posting document the first thing, sir.

Q. Post what? A. Document. A voucher.

Q. A voucher. A. Listing the name and address, account number, and the money to be applied to that account.

Q. And that is what? A slip of paper? A. That is right, sir. A voucher about that size (indicating).

Q. Then what happens next? A. Then that goes into a central control section, and we assemble, oh, say all

the documents that come in in one particular day that relate to one particular book, or a series of numbers in one particular book. We try to keep as many together as we can. We make a journal out of them. Then it goes into the bookkeepers and they post it.

Q. What kind of a record do the bookkeepers have? (106) Do they have an account for each individual? A. That is right, sir. That is the copy right there.

Q. And is this a copy where you say they post it to individual's accounts? A. That is right.

Mr. MacMahon: May the record—

The Court: When you say "this" you are referring to Exhibit 20 for identification.

Q. Now, how many Collector's offices are there throughout the United States? A. Well, they are now Director's offices.

Q. Now called Director's offices. A. There are 64.

Q. 64? A. That is right.

Q. And a taxpayer could file a return in a different office than yours, for example, the Costellos, couldn't they? A. Yes, they could, but they are supposed to file in the district in which they reside.

Q. But they can file one in another district? A. They would accept payment, that is right, a Director would accept payment.

Q. Always accept payment, do they not? A. That is right.

Q. Also accept the return? A. That is right.

Q. So when you were testifying about not finding (107) any return yesterday—prior to what year was it, you said? A. Prior to '43, I think it was '37 through 1942 for Loretta. Was that Loretta?

Q. In any event, you didn't mean to indicate that returns might not have been filed by Mrs. Costello, for example,

in another district, did you? A. I meant to say that they were not filed in the district in which they reside, and any proof of such filing would be up to the taxpayer.

Mr. Fennelly: I move to strike out the answer as not responsive.

The Court: You asked him what he meant and he told you. I won't strike it.

Q. Isn't it so that a return might have been filed in another district?

The Court: Isn't it the fact that what the witness told us yesterday was that he was talking about records in his own office and that what he said was that according to those records it showed no payments made by these taxpayers in that office? That is all he said.

Mr. Fennelly: All I am trying to develop with him, is they may be filed in another office.

Might I have Exhibits 3 to 7. You had better let me have 3 to 14, if you would.

(Mr. MacMahon hands to Mr. Fennelly.)

(108) Q. I show you Government's Exhibit 14, being the tax return of Frank Costello for the year 1937, and that reports gross income, does it not, of $66,461.94? A. $60,583.47.

Q. Gross? A. I think so. I am sorry, I am sorry. I was reading Net. $66,461.94.

Q. And Net some $60,000, is that right? A. That is right.

Q. And coming to the year 1943, Government's Exhibit 10, return for Frank and Loretta Costello, what was the amount of income reported? A. $60,813.43, sir.

Q. Is that net or gross you are giving me? A. That is gross.

Q. What was the net? A. $60,370.46.

(109) Q. Now, then, for the calendar year 1944, I refer you to Government's Exhibit 8, income tax return of Frank Costello. Will you tell us what the gross income reported was? A. $71,569.33.

The Court: What's that again?

The Witness: 71,569.33.

Q. And in the same year Mrs. Costello filed an individual return, did she not? A. Yes, sir. This is her return, 1944.

Q. Will you tell us—

The Court: What is the exhibit number of the second one?

The Witness: 9.

Q. Will you tell us what gross she reported? A. 11,433.91.

Q. Now coming to the year 1945, I show you Government's Exhibit 6, tax return for year 1945 for Frank Costello, and will you tell us the gross income reported for that year? A. 66,733.57.

Q. And Mrs. Costello filed a return, separately, for that year, did she not? A. Yes. This is her return.

Q. What was the gross that she reported? A. 17,595.52.

(110) The Court: What is the exhibit number of that return?

Mr. Fennelly: 7, your Honor. That is Mrs. Costello's return.

Q. On Mr. Costello's return for 1945, Government's Exhibit 6, he had paid on his estimate of his tax how much? A. $44,220, sir.

Q. That is a prepayment of the tax during the year, is it not, instalments? A. That is right, sir.

Q. In that year Mr. Costello, 1945, had overpaid his income tax, had he not? A. Yes, sir; he did.

Q. By how much? A. $11,731.29.

Q. Did he get a refund or was it credited on the 1946 taxes? A. He asked that it be credited, sir.

Q. He asked that it be credited on his 1946 taxes. How much, sir? A. 11,731.29.

Q. Coming to the year 1946, how much had Mr. Costello reported in his gross income? A. 35,049.35.

Q. How much had he paid that year? A. Including the credit from 1945, he had 20,865.58, sir.

Q. So he overpaid his tax for the year 1946? A. Yes, sir.

Q. By how much? A. 13,693.22

(111) The Court: What's that figure?

The Witness: 13,693.22.

Q. Did he get a refund or did he ask to have that credited on his next year's tax? A. He asked for a credit, sir, in 1947.

Q. He asked you to credit it to the 1947 taxes, is that right? A. That is right.

Q. In that year Mrs. Costello filed a separate return, did she not? A. Yes, sir.

Q. What was her gross income? A. 15,864.36.

Q. For the year 1947, and I show you Government's Exhibit 3, joint return of Frank and Loretta Costello, I ask you to tell me—

The Court: This is for what, 1947?

William N. Murphey—for Government—Cross

Mr. Fennelly: 1947, Exhibit 3.
The Court: Thank you.

Q. (Continuing) —and ask you to tell us how much tax was paid on that return. A. The estimated payments, sir, $15,800.

Q. What was the total payment according to the return? A. He had overpaid on his return.

Q. So that in 1947 he again overpaid on his income tax return? A. That is right.

Q. How much did he overpay in 1947? A. 11,701.08.

(112) Q. Did he ask for a refund or a credit in that year? A. He asked for a refund, that year.

Mr. Fennelly: Could I also have the next two years, '48 and '49?

Q. I show you Government's Exhibit 2, tax return for Frank and Loretta Costello for the year 1948, and would you tell me how much tax was paid in that year? A. He had a payment of estimated tax, $7,500, sir.

Q. Did he have a credit from the year before in that year? A. No, sir, he did not.

Q. Was there an overpayment on the income tax? A. Yes, sir.

Q. How much was the overpayment? A. 6,000—

Q. For the year 1948. A. 6,124.52.

Q. Did he ask—

The Court: What is that figure?
The Witness: 6,124.52.

Q. Did he ask for a refund or to have it credited? A. He asked for a refund.

Q. I show you the Government's Exhibit 1, the income

tax return for Frank and Loretta Costello for the year 1949. Would you tell me how much tax was paid in that year? A. He had estimated payments of $8,000, sir.

Q. Was there an overpayment on the income tax of (113) Frank and Loretta Costello for that year? A. Yes, sir, there was.

Q. How much, sir? A. 5,397.16.

Q. Did he ask for a refund or a credit on that? A. He asked for a refund on that year.

Mr. Fennelly: Mark that for identification.

(Marked Defendant's Exhibit A for identification.)

Q. Mr. Murphey, I show you Defendant's Exhibit A, for identification. Could you tell me whether or not that is a letter—form letter—that is sent out by your department—that was sent out by your department? A. Yes, sir. It was sent out from the old third district office, sir.

Mr. Fennelly: I will offer it in evidence.

Mr. MacMahon: No objection.

(Marked Defendant's Exhibit A in evidence.)

Mr. Fennelly: This is merely a refund for 1940; interest amount of $2.25.

Q. Mr. Murphey, what I wanted to find out, if you could help me: Could you tell me in what item this interest credit would be reflected? A. In the payment schedule?

Q. Exhibit 20.

Mr. Fennelly: Might I come up here to look with

the witness, your Honor? because I cannot follow it very well.

(114) The Court: You may.

A. Here is—

Q. In what item on— A. I couldn't tell from this.

Q. —on this page would the item be reflected? A. It wouldn't be, sir. I would have to look at my—

The Court: Better talk a little louder, Mr. Murphey. The reporter won't hear you. I don't hear you very well.

The Witness: I wouldn't be able to tell, sir, from this document which item it came out of.

The Court: When you say "this document," you are referring to Defendant's Exhibit A?

The Witness: Both, that and the assessment list, sir.

The Court: By looking at that and Exhibit 20 for identification, you cannot answer Mr. Fennelly's question?

The Witness: No. I would have to look at the schedule number that is indicated on this document. The records are in my office, and they would tell me the exact items it came from.

Q. Similarly, I take it you could not now tell as to which item it came from on Exhibit 24, which is in evidence, which is your— (115) A. No.

Q. (Continuing) —schedule which you prepared? A. No. I would have to refer back to my schedule.

Q. Would you see whether you can find on Exhibit 24 an item of payment on or about June 28, 1946, in the sum of $7,874.18? A. How much money, sir?

Q. $7,874.18.

The Court: What does that represent, Mr. Fennelly?

Mr. Fennelly: I beg your pardon?

The Court: I say, what does that figure represent?

Mr. Fennelly: A payment of tax.

The Court: Oh, a payment of tax, not one of the refunds?

Mr. Fennelly: No, no; payment of tax, your Honor.

A. That could be a combination. How much was it?

Q. $7,874.18. It was in one check. A. I see no such item here.

Q. Would you look on your underlying assessment roll from which you prepared that schedule, Exhibit 20, and see whether you find any such item? A. On this, Mr. Fennelly, I would have—

The Court: When you say "this," you are pointing—

The Witness: The assessment list. And I will (116) have to look—

Mr. Fennelly: Exhibit 20 for identification.

The Court: 20 for identification.

A. (Continuing) I have to go through the entire list, sheet by sheet, because these payments, say, they were all paid in 1946.

The Court: When you say "these payments," you are referring to Exhibit 24?

The Witness: Let us say all payments made in 1946.

The Court: Yes, but what I am trying to do, Mr.

Murphey, I am not trying to question you except to try to get you into the habit of referring to whatever it is you are talking about by the exhibit number it has in the trial. Otherwise anybody reading this record wouldn't know what you are talking about.

The Witness: From Exhibit 24, the records of taxes paid in 1946, I wouldn't be able to identify a particular item in Exhibit 20 unless I covered each sheet because—

The Court: Each sheet of which?

The Witness: 20, sir. Because the items all paid in 1946 are scattered through the various accounts on Exhibit 20.

Mr. Fennelly: Your Honor, for the purpose (117) of saving time, I wonder if I might not go over these to find the details instead of trying to have Mr. Murphey do it now? I would be able to do it sometime afterwards. I mean, I do need the information.

The Court: Oh, yes, but what is your suggestion?

Mr. Fennelly: If it would save any time, I am perfectly willing to do it afterwards, if the Government wants to go ahead with their case. Otherwise I would like Mr. Murphey to find it.

Mr. MacMahon: Your Honor, I would like redirect examination of this witness on these matters at this time.

The Court: Well, you will get that. That is not the point of the suggestion, whether you get redirect.

Mr. MacMahon: To save time, I may point out that on Government's Exhibit—what is the schedule?

The Witness: 24.

Mr. MacMahon: —24, the item which Mr. Fennelly refers to is a matter of simple arithmetic, by

adding three payments reflected on that schedule. Those three (indicating).

Would you add those, Mr. Murphey?

(118) The Witness: Yes, sir.

Q. $7,874.18? A. Right, sir.

Mr. MacMahon: Would you speak up, please, Mr. Murphey? I can't hear you.

The Witness: Yes, sir. That is right. They were scattered through three accounts.

Mr. MacMahon: And they are reflected in the returns on the schedule?

The Witness: Yes.

Mr. Fennelly: May we not have the examination interrupted?

The Court: Well, frankly I must say I thought Mr. MacMahon helped out there.

Mr. Fennelly: He did help, I quite agree. But I don't think he is helping further.

Q. Would you please show me on your Exhibit 20 where those items are? A. Yes, sir, I will attempt to.

Q. If you know, Mr. Murphey, I would be glad to have you tell us. A. Well—

Mr. MacMahon: Your Honor, the witness has prepared a schedule which will assist in tracing these things for Mr. Fennelly. May he refresh his recollection from it?

The Court: Certainly.

Mr. MacMahon: Your Honor, he also has marked (119) sets of assessment sheets. May he also refer to those?

The Court: Yes. Any time you are asked a question, Mr. Murphey, if you have here any records which will help you in any way in answering the

question you may tell us so and you may use them.

The Witness: These are my work papers.

The Court: You may use them while you are on the stand.

Q. Would you show me the corresponding sheet in Exhibit 20 for identification, which is the only one that I have to work from? A. There you are (indicating), sir.

Mr. MacMahon: Would you speak up, please, Mr. Murphey? We can't hear you back here.

The Witness: I have just indicated to Mr. Fennelly the corresponding sheet in Exhibit 20 to my work sheets, sir.

Q. And this is the—

Mr. MacMahon: With respect to which item, Mr. Murphey?

Mr. Fennelly: Just a minute. Would you let me finish my examination?

Mr. MacMahon: I just want to understand, Mr. Fennelly—

The Court: Now, just a minute. Mr. MacMahon (120) is entitled to find out what figure was being talked about. Isn't it still that same seven thousand odd dollar figure which you just identified?

The Witness: That is right.

The Court: So what you have done now is you have shown where it appeared in Exhibit 24 and where it appeared—

Mr. Fennelly: Now, excuse me. On Exhibit 20 for identification.

The Court: A few minutes ago he added three figures from 24, didn't he, and indicated that made up the seven thousand?

The Witness: That is right.

The Court: And now he is going to Exhibit 20 for identification and seeing where they are there.

Q. Now, which three figures on Schedule 24, Exhibit 24, which is the schedule you prepared, which three figures total that amount? A. The payment date is 7/1/46 and the one amount $5,266.32. This check was split into three different accounts. It was applied against the 1937 tax, Frank Costello. Now, the two items I have indicated to Mr. Fennelly are interest items which come after the original account, so I would like to go back on Exhibit 20 to the original account, show the application of the (121) first payment, then go back to the interest item.

Q. Now, the additional items, in addition to the $5,266.32— A. That is right.

Q. There is another item appearing under the heading of July on Exhibit 20 for identification of $1,293.01. A. Right here.

Mr. MacMahon: Would you speak up, please? We can't hear you back here, either you or Mr. Fennelly, and I am sure the jurors can't hear you.

A. The item of $1,293.01 also appears on Exhibit 24 under the date of 7/1/46 as a payment.

Q. And the other amount that you split that check on was a sum of $1,314.85, is that right? A. That is right, sir, on the same day applied as interest against the 1937 tax.

Q. That wiped out the tax for that year, did it not? A. If I may refer to the exhibit again, sir, I believe it did. This is Exhibit 20. It did close the account for that year.

Mr. Fennelly: Your Honor, I think you would save time—I have got to find something—if perhaps you would have a recess.

The Court: Well, we will recess for lunch when we recess.

Mr. Fennelly: It may take me five or ten (122) minutes to find it.

The Court: All right. It might save time.

Remember the instruction, now, ladies and gentlemen of the jury, don't discuss the case among yourselves, and certainly not with anybody else, and keep your minds completely open until all the evidence is in and until it is submitted, if it is, at the end of the case with the Court's instructions. 2.15.

(Recess to 2.15 p.m.)

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(123) Afternoon Session

(Jury present.)

William N. Murphey, resumed.

Cross Examination by Mr. Fennelly (Continued):

Mr. Fennelly: May I have 23 and 24?

(Mr. MacMahon hands exhibits to Mr. Fennelly.)

Q. Now, would you look at Exhibit 24, which is your schedule of payments, and tell me whether or not you find a payment around February of 1947 in the sum of $6,496.07? A. Six thousand what, sir?

Q. 6,496.07. A. Might be a split account again, sir. I would have to add up the figures. If I could have a pad.

Mr. Fennelly: Have you got a pad that I could lend this gentleman?

(Pad handed to the witness.)

Q. And use any other papers you need to help yourself. A. Would you repeat the figure? I am sorry. Six thousand—

Q. 6,496.07; February, 1947.

(A pause.)

Q. If it will help you, sir, I think that of that amount at least $261.16 is interest. So it might appear as a separate item of $6,234.91. (124) A. $234.91, sir, is that right?

Q. Yes. You see, if you add to that 261.16 it gives you the figure I first gave you. A. That is '47?

Q. What? A. About February '47?

Q. Yes, sir.

(A pause.)

Q. (Continuing) February 20th, to be exact.

(A pause.)

Mr. Fennelly: Mark these.

(Marked Defendant's Exhibits B and C for identification.)

Q. Mr. Murphey, I am sorry; I did not mean to cause you this puzzlement about this, but when I looked at the exhibit I was puzzled because it looked like Egyptian heiroglyphics and I am glad to see you, too, have a little difficulty. Let me show you—

Mr. Fennelly: I withdraw the question.

Q: At the close of this morning you testified that the payment of $7,874.18 on June 26, 1946, wiped out the year 1937. Now—

The Court: Mr. Fennelly, will you look at that Exhibit C and tell me, is the date of it February '47?

Mr. Fennelly: February 20th.

(125) Q. I show you Defendant's Exhibit C for identification, which is dated February 20, 1947, and ask you whether or not that comes from your office. A. Yes, sir, it does.

Q. And Defendant's Exhibit B? A. That is right.

Mr. Fennelly: And I have produced these from the files of the clerk's office of United States District Court for the Southern District of New York.

Q. These indicate, do they not, that there had been paid to your office on the income tax return of Frank Costello for the year—in the year 1947—

Mr. MacMahon: Your Honor, these are not yet in evidence.

Mr. Fennelly: I am sorry. I offer them in evidence. I had forgotten.

The Court: The total shown on those exhibits that you have just offered is the same total concerning which you inquired earlier of the witness, is it not?

Mr. Fennelly: No. I will explain the difference.

The Court: The figure concerning which you inquired was four thousand and some-odd dollars, is it not?

Mr. Fennelly: Pardon?

The Court: Was the figure that you asked him (126) to locate the figure of four thousand and some-odd?

Mr. Fennelly: Just this afternoon?

The Court: Yes.

Mr. Fennelly: No. It was six thousand.

The Court: That is what I say. The figure you just inquired of this afternoon was the same figure that is shown on those exhibits, or is it a different figure?

Mr. Fennelly: The figure—my oral questions are the figures on the Exhibits B and C, Defendant's Exhibits B and C for identification.

Mr. MacMahon: No objection.

(Defendant's Exhibits B and C for identification received in evidence.)

Q. Now, these exhibits indicate, do they not, that February 20, 1947, your office received payment for the account of Frank Costello of $6,496.07.

Mr. MacMahon: Your Honor, I object to that. The exhibit speaks for itself. And I don't believe that is what it shows.

Mr. Fennelly: Well, then I will read it.

Exhibit C, Certificate of Discharge of Tax Lien under Internal Revenue Laws February 20, 1947, United States Internal Revenue, Third District of New York (Mr. Fennelly reads to the jury from Defendant's Exhibit C.)

(127) Q. Now, didn't you tell us this morning that the tax for 1937 had been satisfied by the receipt by you of payment on June 28, 1946, of $7,800.18? A. Yes, sir, I believe I said that.

Q. Now, you did receive in 1947 an additional sum of money, did you not, in the sum of $6,496.07? A. The lifting of the lien, sir, I believe indicates that that was the amount that the account had on it. Now, I don't believe it is definitely stated there that that is the amount of money received by the collector.

Q. Didn't you receive—that is why I want you to check your records—didn't you receive in 1947 an additional amount of money in the sum of $6,496.07? A. I will have to check my records, Mr. Fennelly.

Q. What records are there that you have to check? A. I would like to look at my assessment sheets, please.

The Court: The ones that you had here today?

The Witness: Yes, sir.

The Court: You may bring them up and keep them with you as long as you are on the stand.

Mr. Fennelly: Might these be marked for identification so that we may make reference to them?

The Court: Yes.

Mr. MacMahon: Do you have them in any particular (128) order, Mr. Murphey?

The Witness: They are in order, the same order as this, sir.

Mr. MacMahon: Could we mark these, your Honor, 20-A for identification so that their relationship to Exhibit 20 will be shown?

The Court: Yes.

(Marked Government's Exhibit 20-A for identification.)

The Court: And tell us what 20-A consists of.

The Clerk: These are assessment lists.

Mr. MacMahon: Yes. What are these, Mr. Murphey?

The Witness: Assessment sheets, sir.

Mr. MacMahon: How do they differ from the other ones?

The Witness: They are exact copies, they are my working papers, that is all, sir.

The Court: Let me see 20-A.

Will you tell me in what it differs from 20? Is it the same as 20, except for whatever notations appear on the right-hand side?

The Witness: No, on the back of the sheets.

The Court: Or on the back?

The Witness: That is right. I have numbers there.

(129) The Court: In other words, these are photostatic copies which are identical with the photostatic copies that appear in Exhibit 20, except that on 20-A you have some working notes?

The Witness: A key, sir, to look up the account, sir, that is all.

The Court: Very well. All right.

(Government's Exhibit 20-B for identification.)

Mr. MacMahon: Now, Mr. Murphey, would you identify for the Court and jury Exhibit 20-B, please (handing)?

The Witness: Exhibit 20-B is a schedule of income tax payments by date made by Frank and Loretta Costello to the Upper Manhattan District of Internal Revenue, formerly the Third District in New York, from October 18, 1937, to December 31, 1949.

This schedule has a column that I tabled, assessment sheet number, and I have my own working copies numbered, Exhibit 20-A, to refer for quick

identification to the accounts and payments I have listed on this schedule.

Mr. MacMahon: I am referring then to Schedule 20-B, is that right?

The Witness: 20-B.

The Court: 20-B is a set of schedules which you have marked so that you can relate them to the (130) items that appear and your own notes that appear on 20-B.

The Witness: On 20-A. 20-B relates—

The Court: I mean 20-A, yes.

Would it help you to have the question that you are trying to find the answer to read to you, and it will help the jury and it will help me, I think.

(Last question read.)

Mr. MacMahon: Could I have read the Defendant's Exhibit B? I think that will clear up this matter and would show that the lien was filed on the date of Exhibit B, and it was simply listed in that amount as shown on Defendant's Exhibit C.

The Court: Yes. But the question asked of the witness is whether or not at or about the time of Exhibit C the Government did or did not receive a sum of money equal to the sum shown on the exhibit, isn't that it?

Mr. MacMahon: Your Honor, the question fairly should be did the Government receive money—

The Court: Oh, please, Mr. MacMahon. No. This is cross examination.

Mr. MacMahon: All right.

The Court: And Mr. Fennelly may ask any proper question and you may object to it, but presumably the witness knows whether additional money came in or not.

The Witness: I show the account Frank Costello (131) for the year 1947 closed by payment on 7-1-46 in an amount of $5,266.32 plus two interest items which make up this morning's eight thou-and-dollar item. The notice of lifting the liens showing the accounts have been closed were satisfied, sir.

The Court: Well, now, will you get your mind back to what the question is?

At the time the lien was listed in the amount of 6,496.07—

Mr. Fennelly: It was in February, 1947.

The Court: February, 1947.

The Witness: The liens were lifted.

Mr. Fennelly: That is right.

The Court: But was there a sum of money in the amount of $6,496.07 at or about that time received from the defendant by the Government?

The Witness: Not according to any records I have searched, sir.

The Court: Very well. There is your answer.

Mr. Fennelly: Excuse me, your Honor, if I may.

Q. Would you look on your schedule, Exhibit 24, and find for me, please, this item of February 21, 1947, two items, one in the sum of $6,328.56 on your assessment roll Exhibit 20 for identification? A. Yes, sir. Here (indicating). $6,328.56, (131a) $221.47, applied to the 1927 income tax return.

The Court: '27?

Q. Where does it say '27? A. Here (indicating). In the "Remarks" column of the sheets it is indicated that it was for 1927.

(132) Q. Now, you did receive that money on February 20, 1947, according to your records, did you not? A. The

6,496.07 that you speak of, that are noted in the lien papers?

Q. Yes. A. I say no, sir.

Q. According to you record, you received 6,328.56? A. On February 21, 1947, sir, that is right.

Q. On February 20, 1947? A. I have a deposit date, 2/21. It was received 2/20, that is right.

Q. What, sir, appears on your assessment list? A. For the—

Q. Doesn't it show received 2/20/194[illegible] A. That is right, sir.

Q. That is the same day that this lifting of lien, Exhibits B and C, dated February 20, 1947, isn't that right? A. It is the same day, yes, sir.

Q. And, as a matter of fact, wasn't your office told that the amount that you received then was to be applied on the '37 tax? A. I wasn't there, sir. I don't know.

Q. Is it possible that your record is in error and that the 1927, that you say, should be 1937? A. No, sir, it shouldn't be because the 1927 return was a delinquent return listed in 19—prior to June 1934, (133) and the '37 return was listed in '38.

Q. Do you know the nature of the lien that was released on February 20, 1947? A. I know of it, sir. I don't know the full particulars.

Q. It was for the year 1937, was it not? A. The liens were lifted against the years 1937, according to the record of the lifting of liens.

Q. That is right. A. The moneys—

Q. And— A. —that I received the same day were applied to a 1927 account. The lifting of the liens—

Q. You had nothing—

Mr. MacMahon: May the witness continue his answer? Mr. Fennelly cut him off. Go ahead.

A. Notice of lifting of lien does not imply that the moneys came in with the lifting of the lien. Could have been coincidental to the application of the moneys on the 1927—

Q. As a matter of fact—

Mr. MacMahon: May the witness answer?

Q. As a matter of fact—

Mr. MacMahon: Just a minute. May the witness continue his answer?

The Court: Oh, yes.

Q. As a matter of fact— A. Could have been (134) coincidental—

The Court: Did you want to add to your answer?

The Witness: I just wanted to stress that lifting of the lien on the same day, the day before, the day after, was coincidental with closing the 1927 return by payment.

The Court: I see. Are you suggesting, then, that the lifting of the lien might have been, that is, that the lien might have been lifted not because of payment on it but for some other reason?

The Witness: That is right, sir. Probably could have been lifted prior to this date.

Mr. Fennelly: I move to strike out the last answer because it was not lifted, according to the official record of the court, until February 20, 1947.

Q. Will you tell us how much money you received in payments of Mr. Costello's income tax in February 1947? A. February 1947? Yes, sir.

The Court: Mr. Reporter, will you read that question?

(Question read.)

The Court: You mean for 1946 tax or for any other purpose?

Mr. Fennelly: I first want to know what they received.

(135) The Court: Regardless of what the purpose of it was?

Mr. Fennelly: Yes, your Honor.

A. (Continuing) My records show we received 24,286.90.

The Court: What is that, twenty-four thousand—

The Witness: 286.90. All on February 21, 1947.

Q. And did you receive instructions as to how that amount was to be credited on Mr. Costello's taxes? A. I do not know, sir. Again, I wasn't there.

Q. Have you got records in your office indicating what instructions you had? A. The normal procedure would be, sir, to close out the earliest years first.

The Court: No. Do you know—

Mr. Fennelly: I move to strike it out.

The Court: Do you know whether or not there are any records indicating that Mr. Costello or somebody on his behalf gave instructions as to how these twenty-four thousand odd dollars are to be applied?

The Witness: Yes, I would say from the posting document it was clearly indicated that where it was to be applied. If there were specific instructions with (136) it, in the form of a letter, they would be attached, sir.

Q. Where are the posting instructions? A. They are in the Director's office.

Q. Would you produce those, please? A. I certainly will try to.

Mr. Fennelly: Could I have the 1946 or 1949 return?

Q. Mr. Murphey, have you examined your records to see whether or not income tax returns were filed by Mrs. Costello in your office prior to the year 1937? A. I have records going back to 1926. I know of the search that far back.

Q. Do I understand you to tell me that you haven't found any income tax returns of Mrs. Costello's prior to 1937? A. No, sir. I say that from 1937—'38, '39, '40 and '41, '42—through '42.

Q That is not my question. My question is whether—can you tell me whether or not she filed returns, individual returns, in your office prior to 1937? A. Not now, no, sir, I cannot.

Q. You mean you would have to look at your records? A. That is right.

Q. Would you look at your records, please? A. Certainly. I don't have them with me. You (137) understand that, sir?

Q. I understand you don't have them with you? A. That is right.

Q. You would have to go back to your office to look. A. I will recheck them, yes.

(Marked Defendant's Exhibit D for identification.)

Q. On Mr. Costello's '46 income tax return how much were his charitable contributions? A. If I may put in here, sir, I am not an examining agent. I'll be glad to read off the face of the return but any other items would have to be

by an examining agent unless the Court wants me to go into it, sir.

Q. Would you look at it—

Mr. MacMahon: Your Honor, I submit the document speaks for itself.

The Court: Yes. Why don't you read it?

The Witness: Want it itemized or just the—

Q. No. A. —total? Charitable contributions, there is a schedule attached to the return, 6,338.50.

Q. Were all those taken as a deduction for the return or did the charities exceed the amount that one could take as a deduction? A. Again, not being examining officer, I'll read just what it says on the return, "Contributions, see annexed schedule," and that amounts to $6,338.50, (138) limited to 15 per cent of gross income, which reduced the charity contributions to 5,257.40.

Q. For the year 1947 will you tell me, from the return, Exhibit 3, what were the charitable contributions? A. Another schedule attached. The total is $2,739. They were, taken in full, $2,739.

Q. And for the year 1949—8, first, will you tell me what the charitable contributions were? A. Schedule attached to the 1948 return. Total of $2,784, which were taken in full.

Q. And for the year 1949? A. Schedule is attached to the 1949 return also. $4,400 was deducted in full.

Mr. Fennelly: I have found, your Honor, the balance of that item I had this morning.

Q. I show you Defendant's Exhibit D for identification and ask you if that came from your office. A. It came from Washington, sir, this exhibit, but it could have come out of our office. I am trying to see—I am trying to see if

there is any indication that the return was definitely filed there.

The Court: Definitely filed where?

The Witness: With our district, sir. These are forms sent out of Washington as the result of over-assessments. I happen to know this did come from (139) Washington and that return was filed with the Upper Manhattan District.

Q. Was filed in your district, the return, and this is the refund? A. That is a refund, yes.

Mr. MacMahon: Again, this document is not in evidence. May we see it, if we are going to talk about it?

Are you offering it?

Mr. Fennelly: Yes, I offer it in evidence.

Mr. MacMahon: No objection.

(Marked Defendant's Exhibit D in evidence.)

Mr. Fennelly: This is just a claim for refund—a refund—by the Government for an over-assessment of Mr. Costello's tax, $16.04 for the year 1940.

That will be all, your Honor, subject to the obtaining of this information by the witness at his convenience.

The Court: Very well.

Redirect Examination by Mr. MacMahon:

Mr. MacMahon: Do you have the 1946, '47, '48 and '49 returns?

Mr. Fennelly: I left them on your desk, didn't I?

The Witness: Here they are (indicating).

William N. Murphey—for Government—Redirect

(140) *By Mr. MacMahon:*

Q. Mr. Murphey, I show you Government's Exhibit 4 for identification, which is the income tax return of Frank Costello for the calendar year 1946, and ask you if you would read Schedule E on that return? Read it aloud.

A. "Schedule E: Income from partnerships, estates and trusts and other sources." There are four lines on it.

Line 1, "Name and address of partnership, syndicate," so forth.

Indicated here, "Louisiana Mint Company"; the amount of income 19,335.25.

Line 2, "Name and address of estate or trust"—I am sorry. That line is blank.

But line 3 is "From other sources," and typed in on the return is "Miscellaneous 8,229.25."

Making a total of 27,564.50.

(141) Q. Now, is there any detail anywhere on that return showing the source of that miscellaneous income? A. There is a typed explanation. Shall I read it, sir? This memorandum in support of—no, this is in support of a protest.

Q. Any detail? A. No, sir.

Q. Are there charitable contributions detailed? A. Yes, sir, charitable contributions detailed.

Q. How many of them are listed? A. About 30, I would say, sir.

Q. What is the smallest one shown? A. An item of $23, sir.

Q. Are those deductible on your income tax return, Mr. Murphey? A. Yes, sir, they are.

Q. I show you Government's Exhibit 1 for identification, the joint income tax return of Frank and Loretta B. Costello for the year 1949, and would you read Schedule E, please? A. (Reading) Schedule E—"Income from partnerships, estates and trusts and other sources." Line 1,

partnership, syndicate, etc. miscellaneous income. This is typed in. "Miscellaneous income $16,300."

Line 2, "Estate or trusts." "Operating loss on oil wells, see schedule, loss of $18,950.86."

Line 3, "Other sources. State nature. G.M." (142) then a capital "M. Levy, 1539 Franklin Avenue, Mineola, New York," Income of $15,000 from that source.

Q. As to the first item that you read there, $16,000 miscellaneous income, is there any detail shown on the return? A. No, sir.

Q. You read something about a loss, was it, $18,000 loss? A. That is right, sir.

Q. On oil wells. Is there detail to support that shown? A. There is, sir. There is a schedule showing how they arrived at the figure.

Q. Is that a detailed schedule? A. It is, sir.

Q. Is that loss deductible? A. Yes, sir.

Q. Does that schedule, that return, list charitable contributions? A. Yes, sir, there is a schedule.

Q. How many of them are there? A. About 15, sir.

Q. What is the smallest one of them? A. $50.

Q. Of course, those charity deductions are deductible, aren't they? A. Yes, sir.

Q. I show you Government's Exhibit 2 in evidence, the joint income tax return for Frank and Loretta B. Costello for the year 1948, and I would ask you to read line 3. A. On the front, form 1040, line 3, "Enter here the total amount of your dividends." That is typed (143) in again, miscellaneous income $9,500.

Q. Are there any details shown anywhere on the return to support that figure? A. No, sir.

Q. Were charitable deductions taken on this return? A. Yes, sir; there is a schedule.

Q. How many are listed? A. About 15, sir.

Q. What is the smallest one? A. $50.

Q. Of course, those are deductible? A. Yes, sir.

Q. Mr. Murphey, I understood Mr. Fennelly to ask you with respect to certain years on cross examination whether Mr. Costello had overpaid his taxes in certain years. I understood you also to say that he had. Now, what were you basing that answer on? A. The answer was based on the overpayment as computed by the taxpayer on the income reported.

Q. Now, on an income tax return did Mr. Costello claim an overpayment? A. Yes, sir, he did.

Q. And if the income were fraudulently stated would there have been an overpayment—understated? A. No, sir.

Mr. Fennelly: Excuse me.

Q. In substantial amounts.

Mr. Fennelly: Excuse me. I object to the question. This gentleman is not an expert. He has testified—he didn't want to testify to the returns—

(144) The Court: He testified to this before you made your objection.

Mr. MacMahon: Your Honor, this subject was opened up on cross-examination.

Mr. Fennelly: I move to strike it out.

The Court: The question was answered.

Mr. Fennelly: I say, I move to strike it out.

The Court: Oh.

Mr. Fennelly: Someone was engaging me in conversation.

The Court: I will allow it. That is a question of weight.

Q. What was your answer, Mr. Murphey? A. I would say the overpayment would not be indicated if there—

Q. If the true income is not reflected on the return? A. The overpayment would not be indicated or it would be less.

Q. In other words, the overpayment that you testified to is based on the assumption that the true income is on the income tax return, is that right? A. That is right, sir.

Mr. MacMahon: That is all for this time, your Honor, until he brings back these other records.

The Court: Do you desire to ask any other questions?

(145) Mr. Fennelly: No, not until he returns with the information.

The Court: Very well. You may step down. Thank you.

(Witness temporarily excused.)

Mr. MacMahon: The Government calls Philip Hart. If he has not returned, Miss Hough.

PHILIP HART, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

Q. Mr. Hart, where do you live? A. 6361 99th Street, Forest Hills.

Q. What is your occupation, sir? A. I am a certified shorthand reporter, and an attorney.

Q. When were you certified as a shorthand reporter? A. Well, I believe I took my official certificate in July, 1939, late 1938 or 1939, No. 135.

Q. Now, sir, on August 24th and 25th, 1939, were you

employed as a Grand Jury stenographic reporter in this District? A. I was.

Q. And on those two days were you present in the Grand Jury room when the defendant Frank Costello testified (146) as a witness? A. I was.

Q. Would you tell us what you did on those two occasions, sir? A. I reported stenographically everything that transpired verbatim.

Q. And in what did you take your notes? A. In a notebook.

Mr. Seymour: Would you mark this for identification?

The Court: May I have the date that you are inquiring about?

Mr. Seymour: Yes, sir; August 24th and 25th, 1939.

(Marked Government's Exhibit 27 for identification.)

Q. Mr. Hart, I hand your Government's Exhibit 27 for identification and ask you if that is the notebook in which you took your stenographic notes— A. That is.

Q. —on those days? A. It is.

Q. Now, after you left the Grand Jury room on those two days, did you prepare a transcript? A. I did.

Q. From your notes? A. I did.

Mr. Seymour: Would you mark this, please?

(Marked Government's Exhibit 28 for identification.)

The Court: 27 is the notebook?

The Clerk: Yes, sir, the stenographic notebook.

(147) Q. Mr. Hart, I hand you Government's Exhibit 28 for identification and I ask you to tell us whether it contains pages which are the typewritten transcript you just referred to. A. This apparently is my typewriting.

Q. Would you identify, please, which particular pages were prepared by you? A. I believe every one of these pages were prepared by me.

Q. Is there any symbol on the pages which indicates that you prepared them? A. Well, there is, at the top, indicating PH, meaning my initials. As it went, we spelled each other, various portions, and we would put down our initials at the top of the page to indicate who took a particular "take." Yes, there's 13 pages of the first, then there was an adjournment on August 25th. (Turning pages) Up to page 24.

Q. Initials? A. Initials, PH. That is the time I was relieved and followed by EJH.

Q. The pages up until that time are the transcript you prepared? A. Yes, sir.

Q. Now, Mr. Hart, have you compared the typewritten transcript against your stenographic notes taken on those two days? A. I have.

Mr. Seymour: Would you mark these?

(148) (Marked Government's Exhibit 29 for identification.)

Q. Now, Mr. Hart, after comparing your stenographic notes to the transcript, did you find that there were any corrections? A. I did.

Q. Did you make such corrections? A. I did.

Q. On what did you make such corrections? A. I made it on the mimeographed copy, with my initials placed thereat, and the date I made the corrections.

Q. I hand you Government's Exhibit 29 for identification and I ask you if that is the copy on which you made your corrections? A. That is. My initials appear thereon and the date I made the changes.

Q. Mr. Hart, I believe you used the word "mimeographed" copy. A. That is a photostat. Pardon me. It should be "photostat." I meant photostat.

The Court: When you say you made corrections, do you mean that the corrections were made on those photostatic sheets?

The Witness: Yes, your Honor.

The Court: Pages.

The Clerk: Are those corrections of the stenographic transcript, for my records?

Mr. Seymour: Government's Exhibit 29 for identification, your Honor, is a corrected photostatic copy (149) of pages contained in Government's Exhibit 28 for identification.

The Clerk: All right, thank you.

Q. Now, sir, that photostatic copy marked Government's Exhibit 29 for identification, bearing your corrections on the basis of the comparison made on the dates indicated, is that now a true and correct transcript of your stenographic notes taken on August 24th and 25th, 1939? A. I will say yes, ninety-nine hundredths per cent.

Mr. Seymour: Would you mark this?

The Court: Will you tell us when it was that you reread your notes, compared them and made the corrections that you say you made on 29 for identification?

The Witness: If your Honor please, on April 2, 1954, in this building, sir, in the presence of Mr.

Seymour I read from my original notes, and the corrections were made on these photostatic copies.

The Court: That is a complete answer. I only asked the time you did it.

(Marked Government's Exhibit 30 for identification.)

Mr. Seymour: Now, if your Honor please, Government's Exhibit 30 for identification is a photostat of certain portions of the transcript of the testimony of the defendant. Portions of this transcript were taken by another shorthand reporter, who is the next (150) witness. The Government proposes only to offer the portions of the transcript which has just been marked for identification.

The Court: What has been marked 30 for identification.

Mr. Seymour: Yes, your Honor. We do not intend to make the offer until the competency of the balance of the pages has been established by the second witness. I say that so that if Mr. Fennelly cares to cross examine this witness at this time he will be aware of our intended purpose.

Mr. Fennelly: I would think that I cannot very well cross examine until I see the document, and therefore I suggest that he be held here until the paper is offered.

The Court: We will do that.

(To the witness) You may withdraw to the witness room.

(Witness temporarily excused.)

Mr. Seymour: The Government calls Pearl Hough.

Pearl Hough—for Government—Direct

PEARL HOUGH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

(151) Q. Miss Hough, where do you live? A. Yonkers, New York.

Q. What is your address? A. 407 Warburton Avenue.

Q. What is your occupation? A. Shorthand reporter.

Q. Are you certified? A. I am.

Q. For approximately what period of time have you been certified? A. Oh, about 20 years.

Q. Miss Hough, were you ever employed as a Grand Jury stenographic reporter in this district? A. I was.

Q. During what period? A. 1926 to the first of 1942.

Q. On September 29, 1939, in the course of your employment were you present in the Grand Jury room when the defendant Frank Costello testified as a witness? A. I was.

Q. Then would you tell us what you did on that occasion? A. I took down the questions and answers that were—

Q. In what form? A. In shorthand form.

Q. And in what did you take your notes? A. In a notebook.

Mr. Seymour: Would you mark this, please?

(Marked Government's Exhibit 31 for identification.)

(152) Q. Miss Hough, I hand you Government's Exhibit 31 for identification and I ask you whether that is the notebook in which you took your shorthand notes— A. It is.

Q. —in connection with that testimony. A. It is.

Q. Now, after you left the Grand Jury room, Miss Hough, did you prepare a transcript, typewritten transcript from those notes? A. I did.

Q. I hand you Government's Exhibit 28 for identification and ask you whether your typewritten transcript of those notes is contained in that exhibit. A. It is.

Q. Could you identify specifically by page number, initials or otherwise, which pages were prepared by you? A. Well, it says PH-1 through PH-23.

(153) Q. Is there a date indicated? A. The date is September 29, 1939.

Q. And is that the transcript you prepared from your stenographic notes at the time? A. It is.

Q. Now, Miss Hough, have you compared your shorthand notes with the typewritten transcript? A. I have.

Q. And do you find—is the typewritten transcript a true and accurate transcription of the notes contained in your notebook? A. It is.

The Court: What are the pages which contain your transcript?

The Witness: Well, I start with 1, 1 through 23.

The Court: Oh, I see. But in the exhibit itself they appear after some other pages?

The Witness: That is right. Each one is numbered separately.

The Court: Very well.

Mr. Seymour: If your Honor please, at this time the Government offers Government's Exhibit 30 for identification in evidence (handing to Mr. Fennelly).

(A pause.)

Mr. MacMahon: Your Honor, could we approach the bench for just a moment with Mr. Fennelly?

The Court: Yes.

(154) Mr. MacMahon: I have a suggestion.

The Court: Mr. Fennelly, Mr. MacMahon suggests a conference here at the bench. Do you mind coming up now?

I think the jury had better take their recess now.

(Jurors retired.)

(Conference at the bench between Court and counsel off the record.)

(Short recess.)

(Jury present.)

PEARL HOUGH resumed.

Mr. Fennelly: I will object to this, your Honor, as irrelevant and immaterial, and much of it is other matter, and I would also need to see—

The Court: I didn't hear that last part. Much of it what?

Mr. Fennelly: Much of it is other matter. There are so many pages I can't give that to you in detail. But I would also need to see the unexpurgated edition to read what has been—weren't there two of these?

Mr. Seymour: No, sir.

The Court: Let the record show that Mr. Seymour (155) has handed to Mr. Fennelly Exhibit 28 for identification, I guess it was, wasn't it?

The Clerk: Typewritten transcript of 27.

The Court: That is the original typewritten transcript from which 30 for identification was photostated?

Mr. Seymour: Yes, your Honor.
The Court: All right.

(A pause.)

Mr. Fennelly: Isn't there a page missing? It would appear there is a page 3 missing from this photostat.
Mr. Seymour: That page is being omitted from the offer.
Mr. Fennelly: The whole page?
Mr. Seymour: Omitted in its entirety.

(A pause.)

Mr. Seymour: If your Honor please, it might expedite your Honor's rulings if we hand up a duplicate of the exhibit that Mr. Fennelly is studying.
The Court: Be very glad to have it.

(Handed to the Court.)

(A pause.)

The Court: Are you ready to state your objection now, Mr. Fennelly?
Mr. Fennelly: Just half a second, please, your (136) Honor. I have about five pages more to read.

(A pause.)

The Court: I will take your objection now, Mr. Fennelly, whether you have completed your study or not. You have now been reading that short document that I read in about ten minutes, for 45 minutes.

Mr. Fennelly: No, your Honor, we were given two separately and—

The Court: Yes, I know, and one is a copy of the other, and I have read the one with the blocked out parts and I have a fair idea of what was blocked out.

I will take your objection now.

Mr. Fennelly: I have not quite finished reading the—

The Court: I will take your objection now, Mr. Fennelly.

Mr. Fennelly: May I state for the record that I have not quite completed reading the grand jury minutes which are not blocked out?

The Court: You may.

Mr. Fennelly: I object to the statement as it contains matter prior to the years in the indictment and prior to even 1937 which the Government says constitutes their starting point. In addition, it (157) contains many matters which are immaterial and irrelevant and many of them prejudicial.

The Court: Well, if you will indicate by tomorrow morning, when we open court, what part of it you think is prejudicial I will hear you on it. I will give you until tomorrow morning to indicate that to me, any part of the offer, and I will try to rule on it at that time.

Yes, Mr. MacMahon?

Mr. MacMahon: Your Honor, Miss Hough is a court reporter and we are keeping her from her work waiting around here two days to get on the witness stand. Could we deal at this time with the competency of this, and whatever other objections Mr. Fennelly has we could cope with later.

The Court: Well, maybe that is something we might do now. Yes.

Do you want to take up any question that you may have as to the competence of the reporters?

Mr. Fennelly: No, I have no questions at the moment, and I would doubt if I will have any. But if I could, I would like to reserve the opportunity to ask questions. I doubt very much if I would have any.

Mr. MacMahon: That would also apply to Mr. Hart?

(158) Mr. Fennelly: Yes. In so far as I know now I haven't any, but I may have.

Mr. MacMahon: Are these two witnesses excused, your Honor?

The Court: They are excused with the understanding that if Mr. Fennelly determines at some time—Mr. Fennelly determines over the night that he would like to examine the witnesses we will suspend receipt of this until they are called back at some time convenient to everybody so that he may examine them. But we will get along, we will move along to that extent.

You are now excused madam, and if you are wanted again you will be called.

(Witness excused.)

The Court: Now, you wish to go forward?

Mr. MacMahon: Yes, we have a short matter. I think we can very well use the time.

The Court: All right.

(Marked Government's Exhibits 32 to 36, inclusive, for identification.)

The Court: I suggest that you offer these and see if we can make any headway on these as far as we have gone.

Colloquy

Mr. Pierpoint: Your Honor, I have two more, and they go in as a group.

(159) The Court: I know, but I would suggest you get these out of the way first. Let's see if we can save some time. We are going a little slowly.

Mr. Pierpoint: I offer in evidence a certified copy of an income tax return for the Bayou Novelty Company for the fiscal year ended August 31, 1936. That is Government's Exhibit 32.

Government's Exhibit 33 for identification, a certified copy of partnership income tax return filed by Philip Kastel for the calendar year 1936.

Government's Exhibit 34 for identification, a certified copy of partnership income tax return of the Bayou Novelty Company, fiscal year ended August 31, 1937.

Government's Exhibit 35 for identification, which is a certified copy of partnership income tax return by Philip Kastel for the calendar year 1937.

Government's Exhibit 36 for identification, which is a certified copy of the partnership income tax return of the Bayou Novelty Company for the period from June 20, 1937 to March 31, 1938, inclusive.

The Court: You had better hold those now (indicating). They may be marked for identification.

Mr. Pierpoint: There are just two more, your Honor.

(160) (Marked Government's Exhibit 37 for identification.)

The Court: Have you copies of these available for Mr. Fennelly?

Mr. Pierpoint: We haven't, your Honor, because they are certified copies and it is impossible to

photostat them without tearing the certifications apart.

The Court: I don't hear you.

Mr. Pierpoint: It is impossible to photostat them, your Honor, without tearing the certifications apart. They have ribbons and seals which hold them together.

(Marked Government's Exhibit 38 for identification.)

Mr. Pierpoint: Should I complete the offer, your Honor?

The Court: You may make the offer.

Mr. Pierpoint: The Government offers Government's Exhibit 37 for identification, which is the partnership income tax return of the Bayou Novelty Company for the period from April 1, 1938 to December 31, 1939.

The Government offers Government's Exhibit 38 for identification, which is the certified copy of the partnership income tax return of Philip Kastel for the calendar year 1938.

Mr. Fennelly: Exhibit 32 for identification, (161) which is the Bayou Novelty Company, a partnership, I object to on the ground that it appears on the face of the return that Mr. Costello was not a partner and that it is prior to the indictment years, and not binding or admissible as against him.

Mr. Pierpoint: Your Honor, the statement of 1937, given by Mr. Costello, which is Government's Exhibit 23 in evidence, records that defendant Costello had a 50 per cent interest in Kastel.

Exhibit 32 for identification lists Kastel as a partner in the Bayou Novelty Company.

Colloquy

In Government's Exhibit 23 in evidence the defendant stated that he had received from Kastel, actually received from Kastel all of the income reported to have been received, reported for the year 1936.

Government's Exhibit 33 for identification is the partnership return of Philip Kastel, which shows the sole income of the partnership from Bayou Novelty Company, and it shows the two partners to be Kastel and the defendant Costello.

The Court: Let me see 32, which is the one you are talking about, is it not?

Mr. Pierpoint: Yes.

The Court: The objection you made is as to 32.

Mr. Pierpoint: Yes.

(162) Mr. Fennelly: I haven't had a chance to look at 33 yet.

The Court: We are only talking about 32 now.

Mr. Fennelly's chief objection here, apart from the general objection, is that it relates to a period of time as to which there is no evidence of partnership between Kastel and the defendant.

Mr. Pierpoint: Oh, yes.

The Court: That is, as I understand it, the point, Mr. Fennelly.

Mr. Fennelly: Yes, that is one point. And the other is—

The Court: I mean on that question.

Mr. Fennelly: —it is obviously not binding on my client.

Mr. Pierpoint: As to the evidence of partnership between Kastel and the defendant, he stated in 1937 that he went into partnership with Kastel in 1935.

The Court: That is the point. Let me see that statement. I wasn't clear on that.

Mr. Pierpoint: Counsel also, your Honor, re-

ferred to the defendant's income tax return this afternoon for 1936, which reflects his income.

Mr. Fennelly: If it reflects income, I wouldn't know what the object of cluttering the record was with (163) more proof of it.

The Court: That is a new objection. Let me take care of the one you gave first, if I can.

All right. The objection is overruled.

The Clerk: Was that 32?

Mr. Pierpoint: That is Exhibit 32.

The Clerk: It is being admitted?

Mr. Pierpoint: Yes. There is something blocked out on the front.

(Government's Exhibit 32 for identification received in evidence.)

The Court: Now, Mr. Fennelly, I have this suggestion, that we might excuse the jury and we can stay here and you can consider these exhibits, and then if you want to wait and make your objections in the presence of the jury tomorrow morning you may, or if you prefer to wait and do it here this afternoon you may do that, and in that way save a little time here. I certainly would not expect you to be able offhand to determine whether or not you wanted to object or not object to these exhibits.

Mr. Fennelly: I would think that it would not take long in the morning. It would relieve your Honor at the same time as the jury. And I will look at the exhibit.

(164) The Court: Oh, I like to stay around. The pay is the same, you know, whether you are here or upstairs. So we will just let the jury go and I will stay and I may be able to expedite things a little bit.

Colloquy

Ladies and gentlemen, you are excused now until 10.30 tomorrow morning. In the meantime, remember the instructions which I have been giving you and which you are apparently going to hear for a long time: Don't talk about the case among yourselves and certainly not with anybody else, and keep your minds completely open until all the evidence is in and the case is submitted to you, if we reach that point, under the instructions of the Court. 10.30 tomorrow morning

(Jury retired.)

Mr. MacMahon: Your Honor, could I be heard very briefly on this point?

The Court: Yes.

Mr. MacMahon: These exhibits which have just been offered here all dovetail in together, and you can't see the relevance or significance of any one of them apart from all the others. It is a matter of tracing it from the Bayou to Kastel to Costello, and all relate to this 1937 statement, and it fits just like a little jigsaw puzzle.

(164-A) (A pause.)

(Conference at the bench between the Court, Mr. MacMahon and Mr. Delaney off the record.)

(Discussion off the record.)

(Adjourned to April 8, 1954, at 10:30 a.m.)

Colloquy

(165) New York, April 8, 1954,
10.30 a.m.

(Trial resumed.)

(Jury present.)

The Clerk: If there are any witnesses present in the court room, they will please retire to the witness room.

The Court: At the close of yesterday afternoon's session there were some discussions about an exhibit—what was the number of it?

Mr. MacMahon: 30 for identification, your Honor.

The Court: (Continuing)—30 for identification, which consisted of the transcript of some parts of the testimony that were given in a Grand Jury hearing back in 1939.

Yesterday afternoon and again this morning counsel have conferred with the Court and they have arrived at what is to go in and what is not to go in. Some of the questions and answers were eliminated with the consent of the Government; one, I think, was not on the consent of the Government; the Court thought it ought not to be entered. And the exhibit as it is (166) now being presented is received in evidence, and the objections of Mr. Fennelly on the grounds of immateriality and irrelevancy are overruled; and his objection to certain parts of it on the ground that they were prejudicial is now overruled except insofar as certain parts have been eliminated.

Mr. Fennelly has reserved his right to object to particular questions as to which the ruling was adverse to him.

You may proceed.

(Government's Exhibit 30 for identification received in evidence.)

Mr. Fennelly: May I also note at this time, your Honor, objections to Exhibit 30, that portion of it dealing with the minutes of September 29, 1939, page 5, the fourth and sixth questions.

The Court: I don't have the exhibit in front of me and they don't mean anything to me now. If you will let me have the exhibit, I will try to—Which page?

Mr. Fennelly: Page 5, that is, the last section of it, the minutes of September 29, 1939.

The Court: Is this the complete exhibit (indicating)?

Mr. MacMahon: Yes, your Honor.

The Court: You point out to me which page 5. (167) There were three sets. They were taken in three different takes and each take was numbered 1 to 5. You indicate to me the particular questions you have in mind.

Mr. MacMahon: Your Honor, might Mr. Fennelly read the question to which he objects, and the answer?

Mr. Fennelly: This is not settled.

The Court: What?

I think, Mr. Fennelly, it will be a little more helpful to me, and I am sure it will make the record clearer, if at the time the question is read you introduce your objection then.

Mr. Fennelly: Then I will raise the objection of prejudice to the entire statement, your Honor.

The Court: You have done that.

Mr. Fennelly: Yes.

Colloquy

The Court: You did that last night.

Mr. Fennelly: I will rest on that objection.

The Court: That is right, and I overruled it this morning, but I reserve to you your right to object to any particular question again at the time it is read.

In other words, so that there isn't any doubt on the record as to what has happened, you objected on the ground of prejudice to the exhibit as it was offered last night, and at the conferences last night (168) and again this morning we went over each of those questions.

Mr. Fennelly: That is right.

The Court: As to some of them or most of them, I overruled your objection; some were eliminated on the consent of the Government, and there was one that I directed to be eliminated, although the Government did not consent.

I understand your objection with respect to prejudice to go to all the others which you originally assailed and which now remain in the exhibit.

Mr. Fennelly: That is right.

The Court: Very well.

As to those, your objection is overruled, but as I say, you do have the right to object specifically and individually to each question at the time it is read, if you wish to do it.

Mr. Fennelly: My objection also goes that it is irrelevant and immaterial, too, in addition to prejudicial.

The Court: Yes; that I had ruled on last night because I read the exhibit before we took up the question of prejudice, and as to irrelevancy and immateriality, I overruled the objection, and I again overrule it.

Colloquy

So the exhibit now has been received in evidence, (169) and if the Government desires to read it to the jury, that may be done.

Mr. MacMahon: Your Honor, I just want to state that if Mr. Fennelly has any specific objection to any specific question, I think it should be stated on the record here and now.

The Court: Well, I have ruled that he may do so, but I shall certainly not direct him to do so. He may make such objections as he deems advisable, but I shall not direct him to make it in any other form than he has.

Mr. Fennelly: I just spent half an hour with Government counsel and your Honor, pointing out what the objections were. I see no need of doing it and wasting the time of the jury.

The Court: I see no need at this time of getting into this conversation.

Let us get on with the trial.

If you want to read the exhibit to the jury, you may.

Mr. MacMahon: Thank you, your Honor.

(Mr. MacMahon read to the jury from Government's Exhibit 30.)

Mr. Pierpoint: Your Honor, we had pending last night an offer by the Government—Government's Exhibit 32 was admitted into evidence—and we have pending (170) an offer of Government's Exhibits 33 through 38.

Mr. Fennelly: I object to Exhibit 33 solely that it is immaterial as to the question of time.

The Court: That is the tax return of what taxpayer?

Mr. Fennelly: Of Philip Kastel.

Colloquy

Mr. Pierpoint: It is a partnership of Philip Kastel, your Honor, showing Frank Costello and Philip Kastel as two partners.

The Court: Objection is overruled.

Mr. Fennelly: And on the exhibits from 32 to 38 which are Bayou Novelty on the ground that it appears on the face of them that Mr. Costello was not a partner of Bayou but that he was a partner of Mr. Kastel, which appears—

The Court: That Kastel had an interest in Bayou.

Mr. Fennelly: Yes. (Continuing)—which appears—

The Court: Any objection to—If you will tell me what those are, I would prefer to do it by each exhibit.

Mr. Fennelly: Exhibit 34 is the income tax return for a fiscal year.

The Court: Well, it is the Bayou return, is it not?

Mr. Fennelly: It is Bayou.

The Court: The objection is overruled. Exhibit 35, (171) I think that is another Kastel return, is it not?

Mr. Fennelly: No. 35, there is no objection. That is a Kastel partnership return.

The Court: Very well.

Mr. Fennelly: For the year 1937.

The Court: Yes.

Mr. Fennelly: No. 36 is Bayou for 1937.

The Court: And the objection to that is overruled.

Mr. Fennelly: No. 37 is Bayou for 1938.

No. 38 is—

The Clerk: What about 37?

Mr. Fennelly: That is Bayou.

The Court: 38 is Bayou.

Mr. Fennelly: I am sorry. I must have made a mistake there. 37 is Bayou.